fessions,[8] and in the theory that where a statement is offered as a confession, though really only an admission, it must be governed by the confession rule.

A. M. K.

EVIDENCE: EXCEPTION TO HEARSAY RULE: STATEMENT OF PRESENT PHYSICAL CONDITION OR PRESENT PAIN, WHEN NOT MADE TO A PHYSICIAN —Since the early Massachusetts case of Barber v. Merriam,[1] the exception to the hearsay rule in the matter of "pain statements" has been somewhat confused. Expressions of present pain in the form of inarticulate groans are everywhere admissible[2] on the theory that they are spontaneous and therefore free from premeditation. Logically, assertions of present pain in definite words should likewise be admissible, because they have an equally certain guaranty of trustworthiness. Groans are as easily manufactured as words. But an anomalous limitation has been placed on statements of present pain. Barber v. Merriam held that statements as to past pain were admissible, as an exception to the hearsay rule, where made by a patient to a physician in consultation. By an apparent misunderstanding of this case the New York Courts applied this limitation to all statements of pain, whether past or present.[3] Unfortunately, many courts, including that of California, have cited and followed the New York decisions as the orthodox rule.[4] In the absence of any sound distinction between groans and articulate assertions of pain, one principle should be applied to both. It may be admitted that involuntary expressions of pain, having a guaranty of trustworthiness in their spontaneity, stand as an exception to the hearsay rule.

But the exception may be stated more broadly, so as to include all statements as to present physical condition. Its basis is the peculiar character of the facts contained in these statements. Matters of physical feeling are only within the knowledge of the person who experiences them. The guaranty of trustworthiness is the fact that such statements are ordinarily made without any motive of self-seeking but are naturally a part of ordinary conversation. The guaranty is much the same as that in the exception as to family pedigree.

But at most the trustworthiness of statements as to present physical condition cannot be more than a presumption always subject to rebuttal where any circumstances of suspicion arise. The exception should be limited to cases where the person himself is unavailable as a witness at the time of trial. This circumstance supplies the necessity for the rule. In most juris-

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[8] Chamberlayne, The Modern Law of Evidence, sec. 1475.
[1] Barber v. Merriam, (1865) 11 Atl. 322.
[2] Wigmore on Evidence, sec. 1718.
[3] Reed v. R. Co., (1871) 45 N. Y. 578.
[4] Wigmore on Evidence, sec. 1719.

dictions, however, which admit statements as to present pain, or as to present physical condition, the holding is that the unavailability of the witness at trial is immaterial. These statements are regarded as the expression of the person's feelings at the moment when they were most strongly felt, and so given their best possible expression. This view may properly be taken as to involuntary expression of present feeling. In their case the original statement, by reason of its spontaneity, is better than any which may be obtained subsequently, even when on the stand with the aid of cross examination. But the larger exception stated has not this guaranty of spontaneity; the original statement loses its peculiar value and character if the party is available as a witness at the time of trial. It is true the individual feelings are most vividly in mind at the time they are experienced; but this fact is true of all experience and so cannot be made the test.

In People v. Wright,[5] the Court held that a statement made by a woman as to her then condition of pregnancy was admissible, although not made to a physician. No mention is made of the earlier California cases,[6] in which the anomalous rule of the New York Courts was approved and adopted and a contrary result reached. The view suggested by the principal case is more logical than that of the Estate of James,[7] and it may be taken as at least preparing the way for the adoption of a more liberal and rational rule in this jurisdiction as to the admission of statements of present physical "condition" or "present pain."

C. S. J.

INNKEEPERS: RIGHTS OF GUESTS.—The decided cases are few, in which a guest has sought to recover of an innkeeper for injuries inflicted by a hotel servant. But it seems unquestionable, both on principle and by analogy, that the innkeeper owes a duty to his guest that he shall be treated with courtesy and protected from assault. Thus, in Nebraska it was held that an innkeeper was liable for injury to a small boy, who was a guest, through the accidental discharge of a pistol in the hands of an employee, even though the accident happened in a room, not intended for guests, into which the boy had intruded.[1] The court's decision seems to have been based upon the theory that the innkeeper's liability is similar to that of a common carrier, who has been held responsible for assaults and insults suffered by passengers. The contract between carrier and passenger obligates the carrier not only to transport the passenger, but to secure him

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[5] People v. Wright, (Jan. 9, 1914) 46 Cal. Dec. 74.

[6] Estate of James, (1899) 124 Cal. 653, 57 Pac. 579; Green v. Pacific L. Co., (1900) 130 Cal. 435, 62 Pac. 747.

[7] Estate of James, supra.

[1] Clancy v. Barker, (1904) 71 Neb. 83, 91, 98 N. W. 440, 103 N. W. 446.